

AMENDED IN ASSEMBLY APRIL 11, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 263

Introduced by Assembly Member Roger Hernández

February 7, 2013

An act to amend Sections 98.6, 1102.5, and 1103 of, to add Section 1171.7 1024.6 to, and to add Chapter 3.1 (commencing with Section 1019) to Part 3 of Division 2 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 263, as amended, Roger Hernández. Employment: retaliation: immigration-related document practices.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law provides that an employee who made a bona fide complaint, and was consequently discharged or otherwise suffered an adverse action, is entitled to reinstatement and reimbursement for lost wages. Existing law makes it a misdemeanor for an employer to willfully refuse to reinstate or otherwise restore an employee who is determined by a specified procedure to be eligible for reinstatement.

This bill would also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. The bill would provide that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. The bill would subject a person who

violates these provisions to a civil penalty of up to \$10,000 per violation. The bill would also provide that it is not necessary to exhaust administrative remedies or procedures in the enforcement of these provisions. Because the willful refusal by an employer to reinstate or reimburse an employee who suffered a retaliatory action under these provisions would be a misdemeanor, the bill would expand the scope of a crime and impose a state-mandated local program.

Existing law declares that an individual who has applied for employment, or who is or has been employed in this state, is entitled to the protections, rights, and remedies available under state law, regardless of his or her immigration status. Existing law declares that an inquiry into a person's immigration status for purposes of enforcing state labor and employment laws shall not be permitted, unless a showing is made, by clear and convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

This bill would make it unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related ~~document~~ practice, *as defined*, against a person for the purpose of, or with the intent of, retaliating against any person for exercising a right protected under state labor and employment laws or under a local ordinance applicable to employees, as specified. *The bill would also create a rebuttable presumption that an adverse action taken within 90 days of the exercising of a protected right is committed for the purpose of, or with the intent of, retaliation.*

The bill would authorize a civil action by an employee or other person who is the subject of an unfair immigration-related practice, and would require a court to order the appropriate government agencies to suspend for 90 days the business license, as defined, of a person who violates these provisions for a first violation, as specified, and to permanently revoke that license for a 2nd or subsequent violation, as specified. The bill would require the court to send a copy of its order to the Attorney General, and would require the Attorney General to maintain these copies and a database of violations of these provisions, and post copies of the court orders on the Attorney General's Internet Web site. The bill would authorize a person who prevails in an action pursuant to these provisions to recover reasonable attorney's fees and costs.

Existing law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information

discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for that disclosure. Under existing law, a violation of these provisions by the employer is a misdemeanor. Existing law additionally subjects an employer that is a corporation or a limited liability company to a civil penalty not exceeding \$10,000 for each violation of these provisions.

This bill would additionally prohibit any person or entity from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and would prohibit any person or entity from retaliating against an employee for that disclosure. This bill would provide that any person or entity that violates these provisions is guilty of a misdemeanor, and would further subject an entity that violates these provisions that is a corporation or limited liability company to a civil penalty of not exceeding \$10,000 for each violation of these provisions. By expanding the scope of a crime, this bill would impose a state-mandated local program.

Existing law prohibits an employer or prospective employer, with the exception of certain financial institutions, from obtaining a consumer credit report, as defined, for employment purposes unless it is for a specified position, including, among others, a position in the state Department of Justice, a managerial position, as defined, or a position that involves regular access to \$10,000 or more of cash, as specified.

This bill would prohibit an employer from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 *SECTION 1. The Legislature finds and declares all of the*
2 *following:*

3 *(a) Wage theft is a serious and widespread problem that causes*
4 *severe hardship to low-wage workers, their families, and their*
5 *communities.*

6 *(b) When a worker is denied wages or forced to work “off the*
7 *clock,” there is an immediate and irreparable harm to the worker*
8 *and his or her family.*

9 *(c) Low-wage, often immigrant, workers are the most frequent*
10 *victims of wage theft and are also exposed to the greatest hazards*
11 *at work.*

12 *(d) Immigrant workers have the greatest number of work-related*
13 *injuries and fatalities.*

14 *(e) Far too often, when workers come forward to expose unfair,*
15 *unsafe, or illegal conditions, they face retaliation from the*
16 *employer.*

17 *(f) Where there are immigrant workers involved, employer*
18 *retaliation often involves threats to contact law enforcement*
19 *agencies, including immigration enforcement agencies, if a worker*
20 *engages in protected conduct.*

21 *(g) No employee should have to fear adverse action, whether it*
22 *involves threats to cut hours, move a worker to night shift, or*
23 *contact law enforcement agencies, simply for engaging in rights*
24 *the State of California has deemed so important that they are*
25 *protected by law.*

26 *(h) It is in the public policy interest of the State of California*
27 *that workers be able to report concerns to their employers without*
28 *fear of retaliation or discrimination.*

29 *(i) It is in the public policy interest of the State of California*
30 *for workers to be willing to come forward to expose hazardous,*
31 *unsafe, and unfair conditions at their worksites so that local, state,*
32 *and federal agencies can effectively enforce the laws.*

33 *(j) It is essential to the enforcement of this state’s labor laws*
34 *that we have broad, clear, and effective protections for workers*
35 *engaging in conduct protected by law from all forms of employer*
36 *retaliation, including prohibiting immigration-related threats.*

37 *SEC. 2. Section 98.6 of the Labor Code is amended to read:*

1 98.6. (a) ~~No~~A person ~~shall~~ *may not* discharge an employee or
2 in any manner discriminate, *retaliate, or take any adverse action*
3 against any employee or applicant for employment because the
4 employee or applicant engaged in any conduct delineated in this
5 chapter, including the conduct described in subdivision (k) of
6 Section 96, and Chapter 5 (commencing with Section 1101) of
7 Part 3 of Division 2, or because the employee or applicant for
8 employment has filed a bona fide complaint or claim or instituted
9 or caused to be instituted any proceeding under or relating to his
10 or her rights, which are under the jurisdiction of the Labor
11 Commissioner, or because the employee has initiated any action
12 or notice pursuant to Section 2699, or has testified or is about to
13 testify in ~~any such~~ a proceeding *pursuant to that section*, or because
14 of the exercise by the employee or applicant for employment on
15 behalf of himself, herself, or others of any rights afforded him or
16 her.

17 (b) (1) Any employee who is discharged, threatened with
18 discharge, demoted, suspended, *retaliated against, subjected to*
19 *an adverse action*, or in any other manner discriminated against
20 in the terms and conditions of his or her employment because the
21 employee engaged in any conduct delineated in this chapter,
22 including the conduct described in subdivision (k) of Section 96,
23 and Chapter 5 (commencing with Section 1101) of Part 3 of
24 Division 2, or because the employee has made a bona fide
25 complaint or claim to the division pursuant to this part, or because
26 the employee has initiated any action or notice pursuant to Section
27 2699 shall be entitled to reinstatement and reimbursement for lost
28 wages and work benefits caused by those acts of the employer.
29 ~~Any~~

30 (2) An employer who willfully refuses to hire, promote, or
31 otherwise restore an employee or former employee who has been
32 determined to be eligible for rehiring or promotion by a grievance
33 procedure, arbitration, or hearing authorized by law, is guilty of a
34 misdemeanor.

35 (3) *In addition to other remedies available, an employer who*
36 *violates this section is liable for a civil penalty not exceeding ten*
37 *thousand dollars (\$10,000) per employee for each violation of this*
38 *section.*

39 (4) *In the enforcement of this section, there is no requirement*
40 *that an individual exhaust administrative remedies or procedures.*

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

SEC. 3. Chapter 3.1 (commencing with Section 1019) is added to Part 3 of Division 2 of the Labor Code, to read:

1 *CHAPTER 3.1. UNFAIR IMMIGRATION-RELATED PRACTICES*

2
3 *1019. (a) It shall be unlawful for an employer or any other*
4 *person or entity to engage in, or to direct another person or entity*
5 *to engage in, unfair immigration-related practices against any*
6 *person for the purpose of, or with the intent of, retaliating against*
7 *any person for exercising any right protected under this code or*
8 *by any local ordinance applicable to employees. Exercising a right*
9 *protected by this code or local ordinance includes, but is not*
10 *limited to, the following:*

11 *(1) Filing a complaint or informing any person of an employer's*
12 *or other party's alleged violation of this code or local ordinance,*
13 *so long as the complaint or disclosure is made in good faith.*

14 *(2) Seeking information regarding whether an employer or other*
15 *party is in compliance with this code or local ordinance.*

16 *(3) Informing a person of his or her potential rights and*
17 *remedies under this code or local ordinance, and assisting him or*
18 *her in asserting those rights.*

19 *(b) (1) As used in this chapter, "unfair immigration-related*
20 *practice" means any of the following practices, when undertaken*
21 *for the retaliatory purposes prohibited by subdivision (a):*

22 *(A) Requesting more or different documents than are required*
23 *under Section 1324a(b) of Title 8 of the United States Code, or a*
24 *refusal to honor documents tendered pursuant to that section that*
25 *on their face reasonably appear to be genuine.*

26 *(B) Using the federal E-Verify system to check the employment*
27 *authorization status of a person at a time or in a manner not*
28 *required under Section 1324a(b) of Title 8 of the United States*
29 *Code, or not authorized under any memorandum of understanding*
30 *governing the use of the federal E-Verify system.*

31 *(C) Threatening to file or the filing of a false police report.*

32 *(D) Threatening to contact immigration authorities.*

33 *(2) "Unfair immigration-related practice" does not include*
34 *conduct undertaken at the express and specific direction or request*
35 *of the federal government.*

36 *(c) Engaging in an unfair immigration-related practice against*
37 *a person within 90 days of the person's exercise of rights protected*
38 *under this code or local ordinance applicable to employees shall*
39 *raise a rebuttable presumption of having done so in retaliation*
40 *for the exercise of those rights.*

1 (d) (1) *An employee or other person who is the subject of an*
2 *unfair immigration-related practice prohibited by this section, or*
3 *a representative of that employee or person, may bring a civil*
4 *action for equitable relief and any damages or penalties, in*
5 *accordance with this section.*

6 (2) *Upon a finding by a court of applicable jurisdiction of a*
7 *violation this section:*

8 (A) *For a first violation, the court shall order the appropriate*
9 *government agencies to suspend all licenses subject to this chapter*
10 *that are held by the violating party for a period of 90 days. For*
11 *the purposes of this paragraph, the licenses that are subject to*
12 *suspension are all licenses held by the violating party specific to*
13 *the business location or locations where the unfair*
14 *immigration-related practice occurred. If the violating party does*
15 *not hold a license specific to the business location or locations*
16 *where the unfair immigration-related practice occurred, but a*
17 *license is necessary to operate the violating party's business in*
18 *general, the licenses that are subject to suspension under this*
19 *subdivision are all licenses that are held by the violating party at*
20 *the violating party's primary place of business. On receipt of the*
21 *court's order and notwithstanding any other law, the appropriate*
22 *agencies shall suspend the licenses according to the court's order.*
23 *The court shall send a copy of the court's order to the Attorney*
24 *General.*

25 (B) *For a second or subsequent violation, the court shall order*
26 *the appropriate government agencies to revoke permanently all*
27 *licenses that are held by the violating party specific to the business*
28 *location or locations where the unfair immigration-related practice*
29 *occurred. If the violating party does not hold a license specific to*
30 *the business location or locations where the unfair*
31 *immigration-related practice occurred, but a license is necessary*
32 *to operate the violating party's business in general, the court shall*
33 *order the appropriate agencies to permanently revoke all licenses*
34 *that are held by the violating party at the violating party's primary*
35 *place of business. On receipt of the court's order and*
36 *notwithstanding any other law, the appropriate agencies shall*
37 *immediately revoke the licenses. The court shall send a copy of*
38 *the court's order to the Attorney General.*

39 (3) *The Attorney General shall maintain copies of court orders*
40 *that are received pursuant to this section, shall maintain a database*

1 of the violating parties and business locations that have violated
2 this section, and make any applicable court orders available on
3 the Attorney General's Internet Web site.

4 (4) An employee or other person who is the subject of an unfair
5 immigration-document practice prohibited by this section, and
6 who prevails in an action authorized by this section, shall recover
7 its reasonable attorney's fees and costs, including any expert
8 witness costs.

9 (e) (1) As used in this chapter, "license" means any agency
10 permit, certificate, approval, registration, charter, or similar form
11 of authorization that is required by law and that is issued by any
12 agency for the purposes of operating a business in this state,
13 including any of the following:

14 (A) Articles of incorporation.

15 (B) Certificate of partnership, partnership registration, or
16 articles of organization.

17 (C) Transaction privilege tax license.

18 (2) As used in this chapter, "license" does not include a
19 professional license.

20 1019.1. The provisions of this chapter are severable. If any
21 provision of this chapter or its application is held invalid, that
22 invalidity shall not affect other provisions or applications that can
23 be given effect without the invalid provision or application.

24 SEC. 4. Section 1024.6 is added to the Labor Code, to read:

25 1024.6. An employer may not discharge an employee or in any
26 manner discriminate, retaliate, or take any adverse action against
27 an employee because the employee updates or attempts to update
28 his or her personal information, unless the changes are directly
29 related to the skill set, qualifications, or knowledge required for
30 the job.

31 SEC. 5. Section 1102.5 of the Labor Code is amended to read:

32 1102.5. (a) An employer or any other person or entity may
33 not make, adopt, or enforce any rule, regulation, or policy
34 preventing an employee from disclosing information to a
35 government or law enforcement agency, where the employee has
36 reasonable cause to believe that the information discloses a
37 violation of state or federal statute, or a violation or noncompliance
38 with a state or federal rule or regulation.

39 (b) An employer or any other person or entity may not retaliate
40 against an employee for disclosing information to a government

1 or law enforcement agency, where the employee has reasonable
2 cause to believe that the information discloses a violation of state
3 or federal statute, or a violation or noncompliance with a state or
4 federal rule or regulation.

5 (c) An employer *or any other person or entity* may not retaliate
6 against an employee for refusing to participate in an activity that
7 would result in a violation of state or federal statute, or a violation
8 or noncompliance with a state or federal rule or regulation.

9 (d) An employer *or any other person or entity* may not retaliate
10 against an employee for having exercised his or her rights under
11 subdivision (a), (b), or (c) in any former employment.

12 (e) A report made by an employee of a government agency to
13 his or her employer is a disclosure of information to a government
14 or law enforcement agency pursuant to subdivisions (a) and (b).

15 (f) In addition to other penalties, an employer *or other entity*
16 that is a corporation or limited liability company is liable for a
17 civil penalty not exceeding ten thousand dollars (\$10,000) for each
18 violation of this section.

19 (g) This section does not apply to rules, regulations, or policies
20 which implement, or to actions by employers against employees
21 who violate, the confidentiality of the lawyer-client privilege of
22 Article 3 (commencing with Section 950), the physician-patient
23 privilege of Article 6 (commencing with Section 990) of Chapter
24 4 of Division 8 of the Evidence Code, or trade secret information.

25 *SEC. 6. Section 1103 of the Labor Code is amended to read:*

26 1103. ~~Any employer who~~ *An employer or any other person or*
27 *entity that violates this chapter is guilty of a misdemeanor*
28 *punishable, in the case of an individual, by imprisonment in the*
29 *county jail not to exceed one year or a fine of not to exceed \$1,000*
30 *one thousand dollars (\$1,000) or both and, both that fine and*
31 *imprisonment, or, in the case of a corporation, by a fine of not to*
32 *exceed \$5,000 five thousand dollars (\$5,000).*

33 *SEC. 7. No reimbursement is required by this act pursuant to*
34 *Section 6 of Article XIII B of the California Constitution because*
35 *the only costs that may be incurred by a local agency or school*
36 *district will be incurred because this act creates a new crime or*
37 *infraction, eliminates a crime or infraction, or changes the penalty*
38 *for a crime or infraction, within the meaning of Section 17556 of*
39 *the Government Code, or changes the definition of a crime within*

1 *the meaning of Section 6 of Article XIII B of the California*
2 *Constitution.*

3 ~~SECTION 1. Section 1171.7 is added to the Labor Code, to~~
4 ~~read:~~

5 ~~1171.7. (a) It shall be unlawful for an employer or any other~~
6 ~~person to engage in, or to direct another person to engage in, an~~
7 ~~unfair immigration-related document practice against a person for~~
8 ~~the purpose of, or with the intent of, retaliating against any person~~
9 ~~for exercising a right protected under this code or under a local~~
10 ~~ordinance applicable to employees.~~

11 ~~(b) "Exercising a right protected under this code or under a local~~
12 ~~ordinance" includes, but is not limited to, filing a complaint or~~
13 ~~informing a person of an employer's or other party's alleged~~
14 ~~violation of this code or that of a local ordinance, so long as the~~
15 ~~complaint or disclosure is made in good faith, seeking information~~
16 ~~regarding whether an employer or other party is in compliance~~
17 ~~with this code or with a local ordinance, and informing a person~~
18 ~~of his or her rights and remedies under this code or under a local~~
19 ~~ordinance, and assisting him or her in asserting those rights.~~